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In Search of Microjustice: Five Basic Elements of a Dispute System

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Abstract

This paper integrates findings from legal needs studies, institutional economics, and interdisciplinary conflict research to develop a framework for analyzing dispute systems. Five essential tasks that a dispute system facilitates are identified and the basic technologies for supplying them. Complementarities between these five types of services are discussed, as well as common elements of dispute systems that may be useful add-ons, but do not seem to belong to the essential core.

Establishing the necessary and sufficient elements of a dispute system leads to useful insights about the place of dispute services such as mediation, lawyers, and courts in the broader institutional setting of a dispute system. The framework is also a contribution to the emerging discipline of dispute system design. The framework can be a tool for evaluating existing dispute systems, and for developing innovative, affordable and sustainable access to justice (microjustice).

[1] Helpful comments were provided by Machteld de Hoon, Jan Smits, Jin Ho Verdonschot, Ben Vollaard, and workshop participants at the Hague Institute for Internationalization of the Law (17 April 2008) and Amsterdam Centre for Law and Economics (18 April 2008).

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I. Introduction

A. An Intuitive Idea of a Dispute System

Dispute systems form the context in which people solve their conflicts. People develop their ideas about dispute systems from their earliest childhood experience. They, their parents, and their teachers intervene in disputes regularly. From these experiences, the following picture of a dispute system will gradually emerge. If two parties have a conflict, they will first try to settle it themselves through talking and arguing. Most disputes are more or less resolved in this way. If, exceptionally, they cannot agree, a neutral party intervenes, hears the parties, talks with them, and decides what should happen, applying principles of fairness and justice. The outcome then has to be respected as part of the (now transformed) relationship.

This unsophisticated idea of a dispute system will be enriched with later experiences. Some people will participate in disputes that escalate and lead to serious disruptions in communication, or even fighting. As bystanders they will attempt to restore communication, and perhaps stop the fighting. Complaining about goods, services, or undesirable conduct is another experience most people have with disputes. Sooner or later they will also be accustomed to becoming part of a step by step procedure to deal with these complaints. Lawyers, other advisers, bosses, committees, juries, mediators, and courts enter their picture of a dispute system. They will learn so see dispute resolution as an interaction between the parties, their agents, procedures, and interventions from third parties.

B. What Follows

This paper aims to develop a framework for analyzing dispute systems. Section II begins with an overview of the interdisciplinary literature on dispute systems. It links and tries to integrate knowledge about dispute systems from disciplines such as negotiation theory, conflict studies, microeconomics, institutional economics, and (comparative) legal research. This integration process takes place within a new research area called dispute system design.

Within this emerging discipline, attempts have been made to establish design principles for setting up dispute systems, but this has not yet led to a generally accepted framework for analyzing existing dispute systems, and evaluating their performance. Such a framework can also be useful for coordinating efforts to improve dispute systems. Civil procedure reform is high on the agenda in many jurisdictions (Zuckerman, Chiarloni et al. 1999; Genn 2005). Courts try to improve their performance, and alternative dispute resolution (ADR) programs have been set up. In developing countries, improving access to justice includes integrating informal dispute systems with formal systems (Commission on Legal Empowerment of the Poor 2008), as well as developing new ways to deliver dispute resolution in a way that is affordable and sustainable, such as legal empowerment and microjustice (Golub 2003; Barendrecht and Van Nispen 2008).

Building on the interdisciplinary literature, and on the experiences from attempts to improve existing dispute systems, Section III forms a hypothesis. It presents a model of five essential tasks a dispute system helps perform. For each of the elements, I present reasons why they are necessary in a dispute system, and introduce the basic technologies for supplying them.

Section IV discusses complementarities: each of the five elements is linked to other elements in ways that make their performance dependent upon each other. These complementarities offer additional support for the hypothesis that these are the essential tasks. Section V mentions other possible elements of a dispute system and investigates whether these are a necessary element, in particular by comparing practices in different types of formal (legal) and informal dispute procedures across countries. Together, these sections give the picture of the necessary and sufficient elements of a dispute system. Section VI concludes by discussing the policy implications and offers a preview of two companion papers. The first collects and integrates best practices for delivering affordable and sustainable dispute resolution services (Barendrecht 2009). The second investigates the transaction costs related to delivery of the five elements by the disputants, by the market serving them, and by governments (Barendrecht 2009).

II. Relationships, Justice and Dispute Systems

In this section, we gradually develop a picture on which tasks dispute systems should focus. First, the place of dispute resolution as an ordering mechanism is explored; then an list of the most common disputes people encounter is presented; and finally an overview of the available knowledge base regarding dispute systems.

A. Justice: Governance Mechanisms for Relationships

Dispute systems form part of ordering mechanisms for relationships between people, and give people access to justice. In order to get a more complete understanding of their function in society, it makes sense to investigate the precise links between dispute systems and justice.

Justice is a concept with several meanings depending on the context and the intentions of the speaker. Seen from the demand side, justice may be seen as a valuable good in itself. It is certainly also a means to an end. Protection of certain interests by “law” is a basic condition for human development, for fruitful relationships, and thus for economic growth (Commission on Legal Empowerment of the Poor 2008). Legal systems, taken in

a broad sense and encompassing both formal law and informal legal arrangements, so we might also call them justice systems, are an essential tool to create stable, secure relationships between people and coping with conflict.

When I use the word “relationship” I take this broadly as including the interactions between people at the familial level, commercial contracts, neighborhood communities, or relationships between groups and even states. These relationships require systems of governance (Williamson 2005). The people involved need ways to create transparency in tasks, desirable actions, procedures, and entitlements. Contracts, social norms, formal rules, informal understandings, and registrations are helpful for this. Most urgently, relationships must cope with conflict; for this they need dispute systems. Dispute systems may consist of informal communication, negotiation, and third party interventions, or more formal structures: legal procedures, court trials, arbitration mechanisms, or even lawmaking procedures.

B. Access to Justice in Disputes

This paper thus focuses on disputes, and not primarily on creating transparency in relationships. The starting point of this analysis is someone who experiences a problem in relation to other people, for which she seeks a solution. For an individual, and in particular an individual in a developing country, a dispute is the most likely point of contact with the justice system. It is unlikely that such a person will have previous experience with the justice system such as a registration of property or a written contract. A contract, as well as other instruments that make entitlements transparent, will be treated as an element of the initial situation in which the dispute arises. In addition, increased transparency through allocating tasks, actions, procedures, and entitlements is a possible outcome of the dispute resolution process.

Dispute systems are critical for creating a society with productive and fair relationships between citizens, even more critical than contracts, registrations, and other tools for creating transparency. If identities, contracts, and property rights are uncontested, the costs of creating transparency by writing down the rights and obligations will likely be low. The reason why so many people in third world countries lack formal identity registrations and have unregistered houses or businesses is not that the act of registration is so expensive, but that the contents of their relationships to others are disputed and must first be sorted out. Take the example of a house in a rural community. If an effort is made to register property rights in this community, should the registration of the house be in the name of the man, his wife, the family, or the community as a whole? If this underlying conflict is not resolved, the registration will be challenged or it will not give a realistic picture of the relationships involved (Deininger 2003; Fitzpatrick 2005). Once a well functioning dispute system is in place, relationships will likely become more transparent and less contested over time.

In a typical dispute, there is at least one person who wants a change in the status quo. Therefore, the plaintiff, as he is usually called, is likely to do something about the dispute. A dispute involves at least one other person, who may be called the defendant. This is not an adequate description of every dispute. Sometimes both parties want to take action; at other times, both of them keep silent although every independent bystander perceives their relationship as being stressed by conflict. As we will see, however, the situation where one of the parties wants something to be done and the other is not interested in making moves, adds considerable complexity to the dispute system. This paper only discusses two-party-disputes, assuming that the analysis can be extended to multi-party conflict.

C. Disputes, Trilateral Governance and Enforcement

Socio-legal research has established the most important types of conflicts that individuals experience. According to legal needs surveys, personal security in relation to outsiders and government (human rights protection) presents the most urgent category of

problems (see Table 1). After this comes the core business of any dispute system: property conflicts and issues related to land and housing, problems between employer and employee, family problems, neighbor issues, and business conflicts (categories 2 to 8 in Table 1). Then there are the less urgent (but more frequent) consumer problems, debt collection issues, and problems related to access to essential government services (Barendrecht, Kamminga et al. 2008; Commission on Legal Empowerment of the Poor 2008).

*Table 1 Categories of Justice Needs, Ranked on Basis of Various Indicators of Urgency**

Category	*Threats*	*Governance?*	*Urgency*
1 Basic personal security	Aggression by outside groups, robbery, Unfair detention and treatment by police, Negligence (accidents)	Enforcement rights	High
2 Property rights protection	Property crime, Insufficient property registration, Claims on property by others, Expropriation by government or private developers.	Mixed	High
3 Problems in employment relationships	Employer offering low wage, labor conditions. Unfair dismissal	Relational	High
4 Problems in family relationships	Domestic violence, unfair treatment/exploitation of women and children, Termination (divorce)	Relational	High
5 Problems in land use relationships	Landowner asking high share/rent, Eviction	Relational	Rather high
6 Problems in neighbor relationships	Disturbances, Environmental damage, Neighbor violence	Relational	Rather high
7 Business problems	Untrustworthy or problematic business partners, Bureaucracy, Government exploitation, Extortion by criminals	Mixed	Insufficient indication
8 Identity issues and documents	Bureaucratic authorities, Individuals opposing registration	Enforcement rights	Rather high
9 Problems with sellers of goods/services	Fraud, low quality goods.	Enforcement rights	Medium/high
10 Debt problems	Debts not paid	Enforcement rights	Medium/high
11 Subsistence needs	Welfare benefits not paid by agency	Enforcement rights	Medium/low
12 Problems with financial services	Fraud, conflicts about performance.	Enforcement rights	Medium/low

* Adapted from (Barendrecht, Kamminga et al. 2008)

It is interesting to link these results to the findings of institutional economists. Protection of property rights and enforcement of contracts have been recognized long ago as essential for well functioning market transactions. Here, the essence is to protect rights and make people live up to their obligations. Prevention is key, so dispute systems must be designed with their effects on future disputants in mind (Shavell 2004). This picture fits the categories of disputes that relate to one time dealings between buyers and sellers of goods or services or with government agents. This is the area where market transactions are backed up by threat of enforcement and by a mechanism for establishing the extent of rights or obligations. These rights and obligations have been demarcated by contracts or default rules of private law. Most disputes can be resolved by applying these rules to the case. In practice, dispute resolution in this area is mostly a matter of fair complaint handling, resolving quality disputes efficiently, and ensuring payment. In Table 1, this type of governance and dispute resolution need is indicated by 'Enforcement rights.'

More recently, new institutional economists have stressed the importance of other types of governance that fit long term relationships like families, employment, businesses, and communities. These relationships cope with three problems (Williamson 1987; Williamson 2005). The first is bounded rationality and limited foreseeability, which leads to incomplete contracts. In a marriage or business relationship so much can happen that it is impossible to write down rights and obligations for every contingency (Mechoulan 2005). Adaptation to change thus becomes a critical success factor in these relationships and takes place in a framework of much more open-ended "relational contracting". Second, they have to cope with the possibility of opportunism, where one of the parties does not live up to his obligations. Third are relation specific investments that create

dependence. A man and a woman both invest in their house, in their children, and in relationships with their extended families. If they leave the marital relationship, a substantial part of these investments will be lost. Similarly, two business partners each invest in assets of the business and client relationships. The specific investments create a bilateral monopoly. To get what they want from the marriage or the business venture, the partners in this relationship can only negotiate with the other person (Blair and Kaserman 1989; Hovenkamp 2008).

Because of these three problems, trilateral governance, a neutral arbitration mechanism, is needed in this type of relationship (Williamson 1987; Nooteboom 1992). The parties negotiate "in the shadow of hierarchy" (Borrás and Jacobsson 2004; Borzel and Risse 2005). Socio-legal research has expressed similar ideas in the form of negotiation in the shadow of the law or "litigation" (Mnookin and Kornhauser 1978; Galanter 1984). Later literature stressed that these governance forms should allow for participation of the parties and for 'interactional justice' (Husted and Folger 2004).

In this category of long term relationships, the function of a dispute system is thus rather different. Table 1 classifies it as "relational" dispute resolution. Here the dispute system is a core part of the governance structure, not primarily a protection against opportunism and an enforcement mechanism. The parties know each other well, have to adapt to change, are linked to each other by specific investments, must find ways to share gains, tasks, and losses, and, for them, the ability to trust each other is important. The focus is on negotiating an appropriate solution for problems that arise, which is difficult because of the bilateral monopoly situation. One of the recurring sources of conflict is termination: How should assets be divided and the relationship adjusted if one of the parties wants a divorce, a termination of employment, the land use arrangement, or the business relationship?"

Disputes may also be triggered by acts that we classify as crimes. It is interesting to note that there is a similar distinction here between crimes committed by a stranger, and a substantial category of crimes committed within an existing relationship. Crime surveys consistently show that a majority of criminal acts, even murder and theft, take place between people who know each other. Domestic violence is just one obvious example. Because future relationships are important here, informal justice systems in rural settings in developing countries traditionally provide solutions for such crimes that work between the victim and the perpetrator directly. Reconciliation, limited forms of retribution, and compensation are likely to be part of the package, within the relationship. Formal justice systems are struggling to give this relational aspect of crime an appropriate place through victim-offender mediation and through more attention for the way the offender returns into a network of relationships after having served a prison sentence.

D. Interdisciplinary Conflict Research

Many disciplines study elements of conflicts and ways to resolve conflict, but there is surprisingly little research regarding the design of systems that resolve disputes and the way such systems work. We will now explore elements of dispute systems that have been emphasized in research traditions that study conflict.

Legal researchers, for their part, tend to describe existing procedures for solving disputes. For them, a dispute system is primarily a large body of rules (the law of procedure). These rules should be observed by the disputants and the professionals involved such as lawyers and judges. A commonly used distinction is the one between inquisitorial procedures, where the court is in charge of the fact-finding process, and adversarial procedures, where the parties organize this. Legal scholarship also provides information regarding rules and precedents that can guide the parties and the courts as to the outcomes of dispute processes (substantive law).

The focus of legal scholars when they study civil, criminal, and administrative procedure is limited in other ways. For instance, they are less likely to study processes for conflict-management between the parties. Their core business is decisions regarding court conflicts, which is an important, but rather uncommon way of solving disputes. Moreover, they usually do not deal with the organization of a dispute system. The system is supposed to work as it is spelled out by the rules of procedure. If the system does not work, the solutions are sought in the direction of improving observance of rules, or change of the rules. These rules include the so-called ethical obligations of lawyers, judges, and others to advance the cause of just resolution of disputes.

There are some signs of change, however. Recently, legal scholars have called for a more thorough theoretical foundation of legal procedure. Issues that should be addressed include how to distribute the risk of error across different case-types and different parties; the costs of the procedure in relation to the costs of error in substantive outcomes; the proper role of settlement in civil adjudication; and the proper way to value individual participation and the participation right (Zuckerman, Chiarloni et al. 1999; Bone 2008).

Legal scholarship also compares procedures that are used over the world (Zuckerman, Chiarloni et al. 1999; Chase and Hershkoff 2007). The Principles of Transnational Civil Procedure (PTCP, developed by the American Law Institute (ALI), and the International Institute for the Unification of Private Law (UNIDROIT) are products from this comparative work (ALI and UNIDROIT 2004). In the following, we take these principles as a point of reference when looking for elements of formal, legal dispute systems about which legal scholars tend to agree.

Conflict research is dominated by social psychology, which has developed a wide range of models of conflict, negotiation, and third party intervention (Lewicki, Weiss et al. 1992). It usually takes dependence on the other party (the bilateral monopoly situation) as one of the defining elements of a dispute (Moffitt, Bordone et al. 2005; Deutsch, Coleman et al. 2006). It tends to describe disputes in terms of interests (the needs, wishes, and fears of the disputants) and interactions. In most disputes, interests are mixed (Lewicki, Saunders et al. 2006): some of them are common interests of both parties (living in harmony, for instance); some interests can be dealt with by a trade because they have more value to one party than the costs to the other (specific assets, an apology); and some interests are opposed (indivisible assets valued by both parties, damages, other payments).

Dispute resolution is then seen as a set of processes to cope with conflict. Important subprocesses are integrative negotiations as well as distributive negotiations (Walton and McKersie 1965; Wall Jr and Callister 1995; Bazerman, Curhan et al. 2000; Rahim 2002; Lewicki, Saunders et al. 2006). The parties try to find win-win solutions that maximally serve the interests of both parties (creating value, enlarging the pie), and also find ways to distribute value (splitting the pie). The dispute resolution processes are influenced by positive and negative emotions (De Dreu and Carnevale 2003; Van Kleef, De Dreu et al. 2006), by experienced procedural fairness (Beersma and De Dreu 2003), by social motivation and motivation to find suitable solutions to problems (De Dreu, Beersma et al. 2006), by power differences (Bacharach and Lawler 1981; De Dreu and Van Kleef 2004), by the amount of time pressure (Harinck and De Dreu 2004), and by available exit-options (Pinkley, Neale et al. 1994; Giebels, De Dreu et al. 2000).

Subfields include the psychological, tactical, and strategic barriers to conflict resolution (Arrow 1995), and what people value as procedural justice (Tyler 1997; Tyler 2006; Tyler 2006; Tyler 2007). People tend to evaluate procedures as fair when the person deciding is motivated to be fair, is perceived to be honest, follows ethical principles of conduct, gives opportunities for representation, provides high quality decisions, grants

opportunities for error correction, and does not behave in a biased fashion (Tyler 1988; Tyler 1997).

Substantive outcomes will be evaluated by the parties using ideas about fairness (Fehr and Schmidt 2002; Konow 2003) and distributive justice (Törnblom 1992; Van den Bos, Lind et al. 2001). Other evaluation criteria are linked to the idea that the outcome should be an appropriate solution for the problem and build on concepts such as restorative justice or the ex post efficiency of outcomes (Verdonschot, Barendrecht et al. 2008). In some conflicts a punitive sanction may be appropriate, and this is studied from the perspective of retributive and corrective justice (Darley and Pittman 2003).

Psychologists also study the effects of mediation and arbitration. These two are seen as the two basic forms of (neutral) third party intervention (Carnevale and Pruitt 1992; Lewicki, Weiss et al. 1992; Wall, Stark et al. 2001; Lewicki, Saunders et al. 2006).

Economic modeling gives some insights into the interaction between disputants who try to settle their dispute in the shadow of a neutral intervention by a judge or arbitrator (Tullock 1980; Shavell 2004; Daughety and Reinganum 2008). These often game-theoretic models take into account the effects of private information; the English or American rules regarding costs and other elements of the design of procedures. The number of variables is usually limited, though, and this literature did not yet provide a comprehensive model for dispute systems that is generally accepted.

The literature on bargaining is also relevant to dispute resolution (Carraro, Marchiori et al. 2006). Cooperative bargaining theory has researched optimal solutions for splitting the pie. Under certain conditions rational parties will choose the Nash-solution, which posits that the product of the utilities that both parties gain from a trade is maximized (Muthoo 1999; Mechoulan 2005). The process of arriving at a bargaining outcome is complicated, though. Non-cooperative bargaining theory and empirical work have shown that outcomes depend on the patience of the negotiators, their outside options, their inside options (what they get during the time the negotiations have not yet been concluded), their attitude towards risk, the sequence of offers, the size of offers, the use of commitment tactics, and asymmetric information (Muthoo 1999; Muthoo 2000).

Another line of research relates to the lawyer-client interaction. The incentives on lawyers are studied as a principal-agent problem (Mnookin, Susskind et al. 1999). Markets for legal services are studied as well. Regulation of the legal profession has been explained as a response to market failure, and as a result of rent-seeking by the profession. Most neutral commentators support deregulation to broaden access to legal services and to stimulate innovation (Stephen and Love 1999; Hadfield 2000; Baarsma, Felsö et al. 2008; Commission on Legal Empowerment of the Poor 2008). The lawyer-client relationship is only a part of the dispute resolution equation, however. Until recently, the relationship between clients and courts had hardly been touched. Increasingly, though, the incentives on judges and courts are studied to explain court delay, overburdened courts, and the complexity of legal procedure. One of the consistent recommendations from this literature is that procedures should be simplified and made more responsive to the needs of the clients (Hadfield 2000; Cabrillo and Fitzpatrick 2008; Commission on Legal Empowerment of the Poor 2008). There is not yet a study that investigates the political economy of procedural law, which probably could explain why participants in the legislation process are reluctant to redesign procedures.

As we have seen, institutional economists explained the need for trilateral governance because many relationships must cope with bargaining in a bilateral monopoly situation. In such a relationship the parties can negotiate a win-win deal, but the price for which they split the pie is theoretically indeterminate; there is no single equilibrium price (Hovenkamp 2008). Institutional economists also point to transaction costs as a reason

why parties to a transaction[2] will resort to private ordering with negotiation and arbitration, or use state institutions such as courts for resolving conflicts (Dixit 2004). This literature has not yet developed in the direction of the optimal design of these trilateral governance mechanisms, although some attempts have been made in this direction (Gabuthy and Muthoo 2005; Goltsman, Hörner et al. 2007).

Some economists give criteria for the design of procedures. A common perspective is the one of minimizing error costs and decision costs (Shavell 2004; Cabrillo and Fitzpatrick 2008). According to this theory, it is not efficient to invest more in solving the dispute than the marginal costs of avoiding error (Tullock 1980; Shavell 2004). If the investment decision is left to the parties, it is easy to show that they sometimes spend more than the value in dispute, because they can become trapped in an arms race (Tullock 1980; Baye, Kovenock et al. 1999). Litigation often leads to an interaction where both parties keep investing in lawyers, witnesses, fact-finding, and experts because they have to meet the investments of the other party.

E. Dispute System Design

There is an emerging field of dispute system design (Ury, Brett et al. 1988; Costantino and Sickles Merchant 1996; Shariff 2003; Bingham 2008; Bordone 2008). This literature is closest to the social psychology perspectives on dispute systems. Economic perspectives are less well integrated. It barely touches the relationship with legal dispute resolution and the law of procedure.

Until now, most of this literature concentrates on dispute systems within organizations (labor disputes) and on the design of ADR programs. These authors have identified some useful steps for a design process (diagnosis, design, implementation, evaluation). They also singled out possible evaluation criteria for dispute systems, such as transaction costs, effectiveness, satisfaction, procedural quality, and outcome quality (Bordone 2008; Gramatikov, Barendrecht et al. 2008). Other evaluation criteria are more in the tradition of institutional economics. Hadfield distinguishes six levers of legal design: organization of the judiciary; the organization of the courts and the extent to which jurisdiction is general or specific; the mechanisms of information distribution; the active of passive role of judges in finding facts and shaping the issues in adjudication; the role of public versus private entities in the enforcement of judgments (damages); and the degree to which the mechanisms by which legal services are produced, priced and distributed are competitive or professionally-controlled (Hadfield 2008).

Dispute system design research did not yet deliver a dominant descriptive or normative model of the most basic elements of a dispute system. It lacks a sense of shared meaning (Bingham 2008). Some building blocks of such a model, however, are coming into sight. Normative models have long stressed collaboration as a preferable strategy, as opposed to finding compromises, avoiding, accomodating, or fighting. So normative models of conflict management are generally oriented towards forms of collaboration (Lewicki, Weiss et al. 1992).

In some situations, however, collaboration is not worthwhile, because it is more costly than a quick compromise. Moreover, collaboration between the parties may not feasible, and dispute systems may then still be helpful to contain conflicts, or to avoid their most undesirable consequences. Conventions banning the use of certain weapons are an example. Ury has developed a useful taxonomy of ways third parties can contribute to containing conflict without actually attempting to solve them: by providing relief for needs of the disputants, by teaching them how to cope with conflict, by equalizing, by healing, by witnessing, by refereeing, and by peacekeeping (Ury 2000). In this paper, we will

[2] I will stick to the word relationship, because the transactions in which most severe disputes occur are long term relationships.

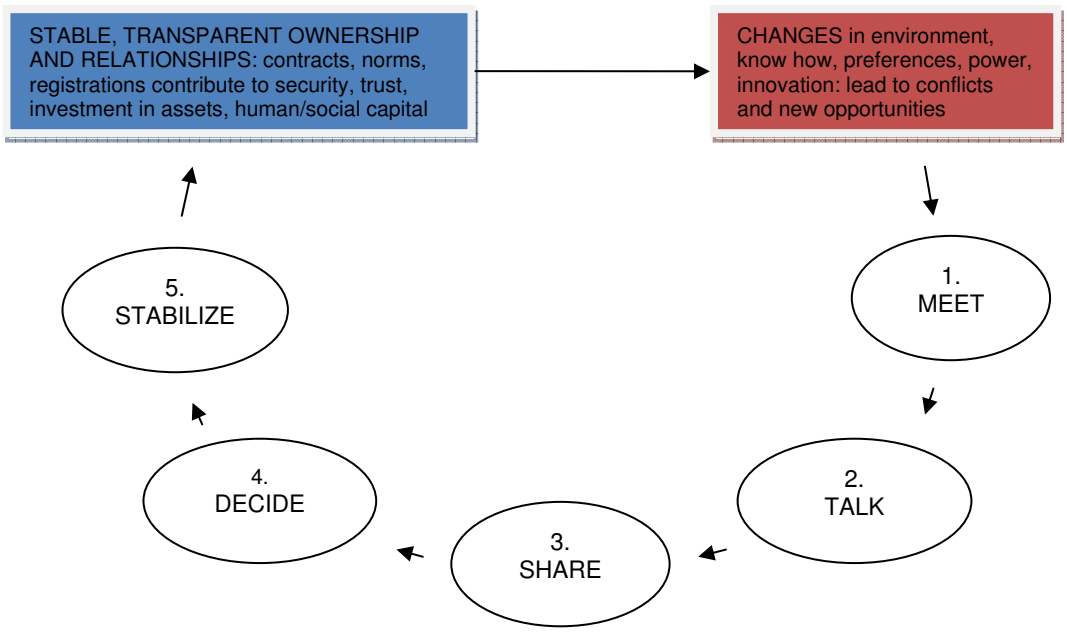
primarily discuss dispute systems aiming at collaborating, which includes third party roles such as bridge-building, mediating, and arbitrating (Ury 2000).

Within the literature on collaboration oriented models, there seems to be agreement that dispute systems are likely to be evaluated favorably if they are interest-based and have loop-backs to negotiation (Ury, Brett et al. 1988). Moreover, they should be inclusive (as to people and issues involved), allow for centralized information processing, delegate sub-processes efficiently, and vest control in the people most affected by decisions (Shariff 2003). Other recommendations relate to the costs of dispute resolution. Dispute systems should be simple to use and easy to access, resolve disputes early, at the lowest organizational level, and with the least possible bureaucracy (Costantino and Sickles Merchant 1996).

We can add to this that actual dispute systems often strive to bring neutrality in the game, and thus apply the ideas of trilateral governance and negotiation in the shadow of hierarchy. This can be achieved through third party interventions. Neutrals can act as a facilitator (mediation), who helps the parties with evaluation on the distributive issues (evaluative mediation, early neutral evaluation), or who even gives a decision that the disputants are expected to live up to (arbitration, adjudication). For this evaluation, people use fairness criteria, social norms, and (substantive) legal rules that can be made more explicit and easily applicable in the form of objective criteria (Barendrecht and Verdonschot 2008).

III. A Model

Building on the intuitive model sketched above and on these literatures, we can now present a model of a dispute system. Our hypothesis is that a dispute system has elements that facilitate at least the following five tasks (see figure 1).



The assistance a system offers to the disputants for each of these five tasks can be seen as goods (services) that must be delivered to the disputants. In the following, we will

discuss the tasks (meet, talk, share, decide, and stabilize) one by one and investigate the the basic technologies for performing them.

A. Meet: Centralized Information Processing

As we have seen, dispute systems mostly deal with long term relationships with high relation specific investments (family, work, business, land, and housing) and one time transactions with suppliers of goods and services (market and government). Ideally, the starting point is that existing property rights, informal arrangements, contracts, and other institutions are transparent and being respected. For long term relationships, dispute systems are part of the governance structure itself; the disputants must adapt to change. Dispute systems will be more relational. For one time transactions enforcement is important, complaint handling is an essential element, and there will be more discussions regarding the extent of rights and obligations.

To cope with both these types of disputes, at least a centralized forum for meeting and talking is essential. Coping with conflict cooperatively requires interaction between the parties. Disputants must come to the negotiation table or appear in court. Some form of centralized information processing is necessary (Shariff 2003). Practically speaking, the parties require a physical meeting place where both are present and willing to communicate about the conflict, or some other communication channel.

A dispute, however, is a situation in which this normal coordination process between people breaks down (Oetzel and Ting-Toomey 2006). Everyday experience shows that people have difficulties meeting and talking when they are in conflict. Divorcees stop communicating. The tenant complains about the landlord behind his back. Leaders of opposing groups avoid each other. Sometimes individuals or groups even choose to fight.

For a dispute system to function, there must be sufficient reasons for both of the parties to participate (Garfinkel and Skaperdas 2007). More generally, there will be a trade-off between what they can gain from a cooperative solution of the conflict as compared with the alternatives of fighting and leaving the matter as it is (Hirshleifer 2000; Hirshleifer 2001; Garfinkel and Skaperdas 2007). In related, and more familiar terms, a person can use his power to deal with conflicts, or let the conflict be resolved cooperatively based on interests and rights (Ury, Brett et al. 1988).

The basic technology of providing a meeting place is thus to make the net benefits and costs of meeting higher than the net benefits and costs of non-cooperative strategies. How this trade-off works out in practice depends on the relationship and the type of dispute. As we have seen, most essential disputes take place between people who know each other, so that meetings can be organized against low cost, social norms are likely to be important incentives, and reputation matters. But whether meeting in order to talk about a dispute is attractive also depends on the expected gains or losses from the rest of the process. If defendants expect a bad outcome from the dispute system, they are less likely to cooperate in the first place. They may also expect large gains from fighting, or from avoiding to go to the meeting place. This may be true, for instance, for a big company defending a claim against a group of customers that is not yet well organized.

B. Talk: Communication and Negotiation

Negotiation is by far the most common form of solving disputes. According to legal needs surveys conducted in countries such as the Netherlands and the UK, around 10% of serious disputes is decided by a court or another neutral decision-maker. Another 45% remains unsolved, for reasons having to do with high expected costs of pursuing the matter, or the plaintiff not choosing to give the matter further attention. The remaining 45% are solved through some form of amicable settlement (Van Velthoven & Ter Voert 2003). In the US, a decreasing percentage of now less than 2% of the civil cases filed go to trial (Galanter 2004; Hadfield 2004). In criminal matters, the vast majority of cases are

solved through plea-bargaining. In developing countries, with limited resources for courts and lawyers, the proportion of serious disputes decided by neutrals is not likely to be much higher, and probably much lower.

Thus, there can be no doubt that coordinated attempts to settle the issues between the disputants are an essential element of a dispute system. These ways of negotiating and settling cases are the main processes most clients experience and determine the outcomes for the vast majority of them.

Not surprisingly, communication and negotiation are major topics in disciplines studying conflict (Moffitt, Bordone et al. 2005; Deutsch, Coleman et al. 2006; Oetzel and Ting-Toomey 2006). This literature tends to advise people involved in a dispute to look for a way to constructively communicate the facts, their views, their emotions, their interests, and possible solutions.

Interest based dispute resolution is recommended (Ury, Brett et al. 1988). Through integrative negotiations, the parties can try to find Pareto-optimal outcomes (Fisher, Ury et al. 1991; Lewicki, Saunders et al. 2006).

The basic technology of integrative negotiations consits of the following process (Walton and McKersie 1965; Fisher, Ury et al. 1991; Lewicki, Saunders et al. 2006):

(1) review and adjust relational conditions to create an environment that promotes communication and information-sharing;
(2) review and adjust perceptions;
(3) focus on interests: the needs, wishes and fears of the disputants;
(4) take a joint problem-solving approach to the dispute;
(5) be creative in developing a number of solutions;
(6) and choose a (win-win) solution that best fits the interests of both parties.

There is hardly any author who doubts that integrative negotiation is one of the essential processes for resolving disputes (see Lewicki, Weiss et al. 1992; Funken 2002 for a discussion of the criticism). This technology is firmly based on the insights of social-psychology, as well as micro-economics, although surprisingly little empirical testing of this approach has been done (Lewicki, Weiss et al. 1992).

Applying these communication and negotiation methods does not solve all disputes, though. Some people are not able to talk and find themselves in a protracted, seemingly unsolvable conflict. Even if people communicate well and negotiate rationally, they may still disagree about the outcome, particularly how much each party gets or must do (the distributive issues), to which we will turn in the next two sections.

C. Share: Distributing Value Fairly

Dividing the pie is an essential part of resolving differences. This is particularly true for relationship conflicts. Household tasks should be shared between family members; salaries and rents have to be adjusted to changing circumstances. In case of divorce or the splitting up of a business, assets must be divided. Neighbors must agree about an acceptable level of noise or an acceptable level of pollution of shared water. Distributive issues may also be core problems in disputes arising out of one-time transactions where rights can be ambiguous or abstract legal rules are difficult to apply. A personal injury claim has to be settled at a certain amount of money, and crimes may deserve some degree of retribution.

Settling distributive issues is difficult. The problem that both parties are better off by concluding a deal but fail to agree on a price is known as bargaining failure. In a competitive market this is not a tremendous issue, because both of the parties can go to another buyer or seller for a similar transaction. Bargaining failure is especially troublesome in disputes, because the parties do not have such an alternative. They are

dependent on each other, the situation that economists call a bilateral monopoly, and as we have seen, there is no single equilibrium price.

The bargaining literature (Muthoo 1999; Muthoo 2000; Carraro, Marchiori et al. 2006; Korobkin and Doherty 2007) gives a good picture of how disputants get stuck on these issues. Game theoretical approaches suggest, and experiments confirm, that a disputant gets a bigger slice of the pie if he has more patience, makes more extreme offers, commits himself more, has more attractive outside and inside options, and has more information. If both parties try these strategies, however, negotiations are more likely to stall or fail, although they could have resulted in a mutually beneficial agreement. Empirical studies tend to find dispute rates between 10 and 49% (Ashenfelter, Currie et al. 1992), so a rather large proportion of disputes are difficult to solve because the parties behave strategically whilst they try to obtain the biggest slice of the pie.

Recently, attention has also been drawn towards fairness considerations. Negotiators in ultimatum games can offer the other party any slice of the pie, whilst the other party can only accept or refuse a deal. They usually make offers in the 0.4 to 0.5 interval. They hardly ever offer less than 0.2, either because they know they will be refused or because they want to treat the other party fairly. Low offers are usually rejected, with the probability of rejection inversely related to the size of the offer (Camerer and Thaler 1995; Carraro, Marchiori et al. 2006).

The message from these experiments seems to be that disputants value fairness and are even willing to forego a solution to a dispute if they are not obtaining a reasonable share of what can be gained. Their opponents know this, and are probably also inclined to be fairer than their pure self-interest suggests. This may result in more settlements and more fair results than the use of purely selfish strategies would imply. Sometimes, however, the desire to reach a fair outcome can also be an impediment to reaching a solution (Arrow 1995).

These fairness considerations are also reflected in worries that dispute systems may be able to deliver settlements, but not necessarily settlements that reflect justice (Welsh 2001; Bingham 2008). Legal systems see just outcomes as a goal, and the organization of courts is geared to delivering fair decisions. The legal system has much less control over the fairness of settlements, or outcomes in alternative dispute resolution.

Whereas conflict researchers tend to agree on a normative model for integrative negotiations, they have not yet developed a commonly accepted model for how disputants should be facilitated to resolve distributive issues by themselves (Lewicki, Weiss et al. 1992). Their advice tends to be oriented towards one of the parties. The Nash-equilibrium is a theoretical cooperative solution, but it has not found its way to negotiation practice, probably because it requires information about both parties positions that they may be reluctant to share (Raiffa, Richardson et al. 2002). Other approaches are interesting for distributing a number of indivisible assets between two parties, but do not solve the problem of splitting a divisible good in shares between them (Shell 2000).

One option for a dispute system is to let a neutral decide distributive issues, which takes us in the realm of third party interventions and is discussed in Section D. Apart from this there is one basic technology for helping parties settle distributive issues in a fair way. Strange enough, it is a technology that is hardly discussed in the literature, although it is a key element of arguably the best known approach to negotiations, the principled negotiation theory of Fisher and Ury (Barendrecht and Verdonschot 2008)

A dispute system can assist the parties with objective criteria (Fisher, Ury et al. 1991). Market prices, rules of thumb used in practice, social norms, or case law can give people information about the way others dealt with similar problems. These criteria can help

parties negotiating in a bilateral monopoly situation assess the fairness of outcomes, which is often difficult for them (Pillutla and Murnighan 2003; Husted and Folger 2004). Although there is some literature regarding the benefits of damages scheduling (Bovbjerg, Sloan et al. 1989; Avraham 2006) and child support guidelines (Rogers and Bieniewicz 2005), the role of norms as facilitating settlement of distributive issues is not an established part of the literature regarding conflict resolution, dispute systems, legal systems, or bargaining. Therefore, I add a bit more explanation about this technology.

A norm stating how property is to be divided after a parent dies makes it easier to settle disputes about inheritance. Clear norms about liability and the amount of damages help settle tort claims. An example from Ghana, where farm land close to cities is sold to developers, demonstrates how this works in practice. (Ubink 2008). Who is entitled to the proceeds of the sale is uncertain. The farmers who worked on the land for many years, the community as a whole, and the village leader all claim they have rights under customary law. Case law from the courts far away in the capital tends to side with the farmers, but that is not the law as it is applied in local practice. Negotiations may take years, and outcomes depend on bargaining power, haggling, willingness to use violence, and many other methods beside justice.

The formal legal system is not always helpful in settling this type of problem, as it tends to say that one or the other party owns the land. The legal system is rather good at allocating rights and obligations or enforcing contracts. In real life, where relationships develop over time and not every contingency has been foreseen, the parties often each have claims that have at least some legitimacy. Farmers, of course, invest in the land, and are dependent on it for making a living. Communities did always have some say in the use and sale of land. The sudden rise in value of the land would be a windfall profit for the farmers. Chiefs are generally not paid for their services, so they have to find some ways to earn their living, and sharing in the proceeds of land sold to developers is one way to do so.

In such a situation, it is helpful to know the kind of sharing rule that is actually used in similar situations. A commonly applied rule in these villages is as follows: 33% goes to the farmer, 50% to the community, and 17% to the chief. Depending on the local circumstances, though, it may also be 17% for the farmer, 8% for the community, and 75% for the chief. If people know that this is the common outcome of the game in their village, they can settle their disputes at approximately the amount that is indicated by the sharing rule. If this outcome is felt to be unjust, the sharing rule can be criticized and discussed.

It is important to note that these objective criteria have a similar function in a dispute as information about a market price in a standard economic transaction (Barendrecht and Verdonschot 2008). Knowing what the going rate for the good or service is on the market, helps both parties negotiate the price. Objective criteria give information about this going rate. This ‘pricing information’ is particularly helpful in the setting of disputes, where there is a bilateral monopoly, so the alternative of going to another buyer or seller for the disputed goods is not available (Yeazell 2008). Knowing what other disputants received in similar situations can help the parties find the reasonable middle ground (Cialdini 2007). If their outcome to the particular dispute fits social norms, or rules coming from the legal system, this gives them the idea they have been treated equally to others in similar situations. It also increases the acceptance of outcomes, diminishes decision regret, and makes it easier for disputants to explain the settlement to other interested parties. Another key point is that these “going rates of justice” do not have to be binding legal norms. Information how others actually settled distributive issues, or suggestions how they *might* settle, can be at least as effective as information about how they *should* settle (Barendrecht and Verdonschot 2008; Verdonschot 2009).

Whether the availability of objective criteria is a necessary element of a dispute system, is open for discussion. Many distributive issues are settled or decided without clear objective criteria. Assessment of damages, for instance, may take place on a case by case basis by a jury, and settlements in personal injury cases hardly ever are linked to certain objective criteria that the parties found useful.

On the other hand, legal systems usually try to produce this type of objective information by supplying codified law or by introducing a system of precedents. Much of the debate in legal research is about the fairness and the justification of legal norms that decide how to distribute value. Without external criteria, it is hardly possible for the parties to establish whether they obtained a fair outcome, and to assess whether a neutral decision maker has treated them fairly. When the rule of law is discussed, we usually do not only look at procedures, but also at the way they are able to produce fair outcomes. So at least some point of reference for this seems to be necessary. Thus, for the time being, we can conclude that information about the fairness of outcomes is a basic technology for resolving distributive issues in disputes.

D. Decide: A Decision Making Procedure

Letting the disputants decide on the outcome, is another essential element of a dispute system. Even if the parties have objective criteria available for the distributive issues, they may still fail to reach agreement. Arriving at an outcome both parties can accept is the primary goal of any dispute system.

The option of addressing a neutral decision maker to impose a solution is the basic technology for reaching a fair and final solution to the dispute. Formal legal procedures are mainly oriented towards making such a final and binding decision available. Most informal dispute resolution procedures also involve a neutral arbiter, committee, jury, or other group that can decide on the outcome. So there can hardly be any doubt that a decision making procedure is an essential part of a dispute system, and that offering the option of a neutral decision to each of the parties is the basic technology for this.

This option has four, distinct effects:

1. In Section A, we have seen that the threat of a neutral intervention may be a necessary incentive to meet and start talking (element 1), particularly for those defendants who are better off in the status quo than they expect to be after a fair solution of the dispute.
2. Once the communication and negotiation takes off (element 2), the same incentives are needed to let such a defendant make moves towards a reasonable solution. Otherwise the more powerful party will get a more favorable settlement.
3. Third, the neutral supervises the negotiations, because both parties know they can be called in to evaluate their conduct in negotiations (element 2 and 3).
4. Finally, someone must decide if negotiations continue to fail, particularly if the parties do not reach agreement on the distributive issues (bargaining failure; element 3).

Availability of access to a neutral decision maker can be a problem because of the high costs. For instance, high costs of access to courts are an often cited problem in formal legal systems (Woolf 1996; Commission on Legal Empowerment of the Poor 2008). Political systems, which also perform dispute resolution tasks, can lack a neutral decision making mechanism and become polarized, leading to stalemate or long power struggles. In other systems, a neutral is more readily available, usually as part of a hierarchy that performs other governance functions besides solving disputes. Teachers, parents, or bosses can provide neutrality in schools, families, and employment relationships.

The costs of access to neutral interventions such as courts include not only direct monetary costs, but also time spent, costs of delay, and costs of stress and the like (Gramatikov 2008). These costs of accessing the neutral are essential parameters of a

dispute system. If we scrutinize the four effects of the option of a neutral decision, it becomes easy to see why.

High litigation costs are not yet a problem insofar access to a neutral decision maker is an incentive for the defendant to meet. The costs of obtaining a default judgment will generally be small. Once negotiations start, however, the threat to let a neutral decide becomes less effective for a plaintiff with limited resources if the costs are high. High costs of litigation also dilute the effects of supervision by the neutral. Finally, they make it more difficult to remedy bargaining failure.

To illustrate this, we can investigate the effects of high costs of litigation on the reasonableness of settlement offers. Let us consider an insurance company acting for the defendant in a personal injury claim of $ 100.000. The company has an expectation of the outcome of the court decision (a 60% probability of obtaining full recovery of the claim) and of the litigation costs for the plaintiff ($ 40.000). If this defendant offers a little more than the value of the expected outcome ($ 60.000) minus these litigation costs (60.000 minus 40.000 is 20.000 so the offer could be $ 21.000), the plaintiff is better off by accepting the settlement than by taking the case to litigation. The only way the plaintiff can avoid this rather unfair outcome is by bluffing that he will take the case to court and cause litigation costs for the defendant as well. High costs of litigation make the bargaining range (Korobkin 2000) so wide that the main issue in the negotiation game becomes not how to convince the other party of the value of the case in terms of the expected outcome as decided by the neutral, but how to get the biggest share of what both parties can jointly save by avoiding litigation.

The dispute system sought to remedy the bargaining failure about the sum in dispute by creating the possibility of a neutral decision. However, in case the costs of reaching the neutral decision are high, the bargaining failure returns now in the form of impasse when the parties try to distribute the litigation costs to be saved. Again, both parties know that they can get a bigger slice of the pie if they are more patient, make more extreme offers, commit themselves more, develop more attractive outside and inside options, and look for information that they hide for the other party.

That this is what happens if the costs of access to the neutral decision are high is confirmed by the often found phenomenon that disputants tend to settle late in the litigation process: “on the steps of the courthouse” (Spier 1992). To extract more reasonable offers, the parties must invest in litigation. If they have invested part of their litigation costs already, for instance by going through extensive fact-finding (discovery), these are sunk costs. The remaining costs of obtaining a neutral judgment now determine the bargaining range (in the example, the costs of obtaining judgments are now $20.000, so the defendant should offer $41.000 to make the plaintiff better off with a settlement). So during the litigation process, when both parties invest in obtaining a favorable outcome in court, the bargaining range gradually becomes more narrow, and it becomes easier to reach a more fair settlement.

Thus, high litigation costs lead to low offers by defendants (and by analogy also to exaggerated claims from plaintiffs) in the first rounds of settlement negotiations. This may deteriorate the negotiation climate. Extreme offers are likely to be experienced as unfair by the other party and thus may add to the psychological costs of dispute resolution. Extreme positions will make settlement failure more likely, particularly in the early stages of litigation. To obtain more reasonable settlement offers, the parties must invest in litigation, even if they do not disagree about the valuation of the case, which is wasteful.

High litigation costs, which usually consist of both expenses and delay, also dilute the effect of neutral oversight over the negotiations. If it is unlikely that a court will ever see a dispute or it will take years to bring the case to the court, this provides little reason to behave cooperatively, at least in the early stages of the negotiation.

Finally, high costs of litigation increase the price of a neutral decision if the parties are both willing to reach an agreement, but simply get stuck on the distributive issues. Between two parties who have more or less equal resources to spend, who face the same amount of litigation costs each, and who both expect similar gains and losses from a settlement, the high litigation costs are less likely to influence the fairness of the final outcome. They can simply avoid them by settling or by asking a less costly neutral party to determine the settlement amount. Sometimes they must invest in litigation and are likely to reach a fair settlement, although it may be late in the litigation process.

This is different, however, for plaintiffs and defendants who cannot afford the costs of litigation. They are likely to receive unfair offers early in the settlement negotiations and be tempted to settle for amounts that they consider unfair. Thus, high litigation costs work against those with limited resources who want a change in the status quo that is not attractive for the defendant. Unfortunately, this is the situation relative to many of the most urgent legal needs. Employees, tenants, women, owners of small businesses, victims of personal injury, and owners of small plots of land will often be plaintiffs and face defendants with considerably more resources. Unless these defendants have exterior reasons to behave reasonably in settlement negotiations, the plaintiffs will get unsatisfactory settlements. That is why the "haves tend to come out ahead" (Galanter 1974; Kritzer and Silbey 2003). If access to the neutral is too costly, the more powerful will still obtain the best results.

Low cost access to a neutral may be advisable, but it is difficult to provide a precise benchmark for this. An often cited criterion is that the sum of decision costs and error costs should be minimized (Tullock 1980; Shavell 2004; Cabrillo and Fitzpatrick 2008). The value at stake (which is a proxy for the cost of error if an error is made), the probability of error, and the likely size of the error are important parameters for establishing the error costs. Decision costs include expenses, time spent, other opportunity costs, and emotional costs associated to preparation, collecting of evidence, consulting lawyers and experts, writing documents, hearing witnesses, and arguing the case in court. To avoid the dilution of the incentives from the option of a neutral decision, the expected total litigation costs should be small in proportion to the value at stake, maybe 10 or 15% and preferably less.

The main argument against providing low cost access to neutrals is that it may lead to a lower settlement rate. The effect of attracting cases that could otherwise settle is studied in the context of arbitration as an alternative for a strike based system of negotiation in industrial relations. This "chilling effect of arbitration" is limited. The empirical literature finds a 75% settlement rate in the shadow of arbitration, against a rate of more than 90% in the shadow of systems where disputes must be sorted out via threats of a strike and termination of employment (Rose and Piczak 1996).

Thus, opening up the possibility of a low cost neutral intervention is likely to improve the fairness of negotiated outcomes, to reduce the costs and collateral damage of disputing, to diminish bargaining failure, and to move some of the decisions from the parties to the neutral decision maker, with probably some increase in the likelihood of erroneous decisions. All things considered, the effect of having low cost third party interventions available seems to be positive. This is especially true because low costs of a third party intervention can more easily be borne by the parties themselves.

E. Stabilize: Transparency and Compliance

Once an outcome is obtained, either by agreement or by a neutral decision, it should be accepted by both parties as a part of their—now transformed—relationship. A typical conflict is settled by an agreement on a number of issues. A settlement between employer and employee, for instance, may entail a period in which the employee looks for another job, an attempt to find other work within the company, a possible severance payment, and a norm for dealing with essential customer contacts. Property conflicts may

be terminated by allocating ownership to one of the parties, temporary rights of use by the other party, a payment, and a share in the proceeds if the property is sold with a profit within two years. These arrangements stabilize the relationship and make transparent what the parties can expect from each other in the future.

A dispute system can facilitate this stabilization process by offering ways to make arrangements explicit. Contracts, settlement agreements, and written judgments help to do this. They are part of a broader technology of making the essentials of a future relationship transparent, including the interests (needs, wishes and fears) of each of the participants, expectations regarding the relationship, the criteria for evaluation of the performance of the relationship, concrete obligations, risks, and procedures to cope with differences.

For stabilization to occur, the parties should also have sufficient reasons to live up to the outcome. For the defendant in particular, compliance must be more attractive than non-compliance. The basic technology of providing compliance is thus not only a matter of incentives. The joint effects of intrinsic motivation and of external triggers to live up to the decision are what matters. There are many reasons why people might comply with what they have agreed as a solution for a dispute or what is decided by a neutral. They may consider this to be their duty, feel it is fair to do, or be afraid of sanctions.

IV. Complementarities

The five elements of a dispute system discussed in section III do not stand on their own. Our discussion already demonstrated how some of the elements are interlinked. Some tasks are easier to perform if one or more of the other tasks are also facilitated more effectively. In this section, these links are examined more closely.

For the parties to meet and start a dispute resolution process (element 1), the expected benefits of meeting must outweigh the costs. These benefits and costs depend on what will happen next. For the plaintiff, a meeting place for talking about the conflict is more valuable if he expects a high-quality communication and negotiation process, information about fair solutions, and the option of an enforceable, low cost, neutral decision. As we saw in Section III.A, the defendant is unlikely to meet if he expects a bad outcome, thus he may need to be enticed by additional benefits of meeting or threatened with informal or formal sanctions.

Facilitating communication and negotiation (element 2) is also not sufficient unto itself. Mediation, for instance, is widely available, though it hardly functions as a stand-alone product. This is understandable, because plaintiffs can expect a reasonable discussion of the dispute, but not a change of the status quo in their favor. The availability of mediation does not guarantee fair resolution of distributive issues. If the dispute is (mostly) about distributing value, the parties also need criteria for fair sharing, and possibly a neutral decision for a reasonable price. Norms and the Batna (Best alternative to negotiated agreement) of addressing a neutral decision, together form the shadow of the law (Mnookin and Kornhauser 1978). If the shadow of the law is not available, as is often the case in developing economies, mediation is unlikely to produce fair outcomes (Welsh 2001; Hernandez-Crespo 2008). In the US and Europe, mediation programs thus tend to function as an add-on to the formal system, mostly in court-annexed ADR programs, not as a separate service.

Objective criteria that guide people to reach fair settlements (element 3) are probably the only element of a dispute system that can function as a stand-alone product. Norms for distributing value provide an anchor-point in negotiations. Communities will informally steer their members towards observing these norms, because they want disputants to stabilize their relationships. However, norms are far more effective tools for settling disputes in the context of a meeting place, where the interests, emotions, and possible solutions can be discussed, against the background of the possibility of a neutral

intervention. So their effect is bigger if other elements of the dispute system are present as well. Norms, in turn, are likely to make proceedings before a neutral adjudicator less complicated. They offer guidance to the parties and to the neutral court or arbitrator.

Neutral decision making (element 4) is also related to the other elements of a dispute system. A neutral can only render a decision that fits the dispute, if the parties inform him about the problem, their interests, and the possible solutions. An optimal division of labor between him and the disputants is probably achieved if the parties attempt to communicate and negotiate an appropriate solution first, and then ask the neutral to decide on the issues about which they disagree (see Section III.D). Facilitated communication and negotiation, as well as guidance by norms, are likely to increase the probability of an optimal decision, so that is another complementarity. The other way round we have seen that access to a low cost neutral decision provides an incentive to meet, works as supervision of the negotiation process, stimulates reasonable settlement offers, and is an essential tool for remedying bargaining failure.

When it comes to stabilizing the relationship (element 5), there are again strong complementarities with the other elements of the dispute system. Negotiated outcomes are more likely to be complied with than imposed outcomes. Research regarding mediated settlements, for instance, reports compliance rates as high as 90%, presumably because the parties own the outcome. If outcomes are seen as more fair, which can be the combined result of transparent objective criteria for distributive issues, and of access to a neutral decision, they are also more likely to be observed. If social norms (objective criteria) about distributive issues are more transparent, non-compliance of outcomes based on these criteria is also more easily detectable. Reputation mechanisms and other informal sanctions are then easier to apply. Procedural justice research has also shown that enforcement is more likely if the procedure is seen as fair (Tyler 2007).

This analysis shows that the complementarities between the five elements are strong. It also offers additional support for the hypothesis that these five elements are necessary elements of a dispute system. Without each of them, the other elements are less likely to perform well.

V. Other Essential Elements or Useful Add-ons?

To show that these five elements are not only necessary of a dispute system, but also sufficient, we must consider other possible elements. In this section, common elements of dispute systems are discussed against the background of research and practices in dispute resolution systems that can tell us whether these are essential elements of a dispute system, or just useful add-ons for specific types of disputes.

A. Containing Conflict if Disputants do not Meet

Generally, a dispute system will aim for some form of collaboration. Even a highly contentious law suit is partly collaborative in nature, because the parties follow rules of procedure. Coordinated information exchange and debate is a way of meeting. If meeting is not possible at all, however, other third party interventions may be helpful (see Section II.D), such as equalizing the positions of both parties through helping the weakest party, healing the damage incurred by victims, monitoring the parties' actions, refereeing in their fighting, and peace-keeping (Ury 2000).

For most conflicts, the danger of further escalation without attempts to settle the conflict is limited, because they take place in continuing, long term relationships, or in settings where the net benefits from cooperative resolution of conflicts are generally high. These elements of dispute systems are therefore not generally needed, though they are important elements of dispute systems that deal with international conflict, civil war, or the consequences of disaster.

It is useful to note, however, that these elements may be important in some respects for the functioning of a collaborative dispute system. First, they may influence the costs and benefits of meeting. For instance, if appropriation of assets by fighting is monitored, this increases the costs of this route out of a dispute, and it makes the cooperative route more attractive. Second, these elements may be part of solutions to disputes. Monitoring future conduct can be an important tool to stabilize relationships; supporting the healing process is likely to be a key part of solutions in disputes in which victims of accidents and crime are involved. Third, they may be part of the negotiation (element 2) and third party intervention processes (element 4).

B. Extensive Fact-Finding: Discovery and Trial

Facilitating communication and negotiation is an essential task of a dispute system (element 2). During this process, the parties exchange information about what happened, their interests, their emotions, and possible solutions. In some conflicts, however, more extensive fact-finding may be necessary. The parties may have reasons to hide facts from their opponent, particularly if they behaved opportunistically or with intentional harm. Crimes may have to be investigated because it is unclear what happened. Damages may have to be assessed.

An example of an extensive fact-finding procedure is the common law discovery process, in which litigants must disclose all relevant information their opponents ask for. In civil law countries, it is usually left to the parties to submit their information to the court. However, they can request the court to order a more substantive investigation of the facts by hearing witnesses, appointing a neutral expert, or ordering disclosure of specific documentation (Kötz 2003; Chase and Hershkoff 2007). This typically happens in a minority of cases. Another extensive fact-finding procedure is a trial, where all the available evidence is presented orally before the court.

Extensive fact-finding is a costly element of a dispute resolution process (Willging, Stienstra et al. 1998). Documents (and increasingly all electronic communications) must be selected, collected, copied, and read by the other party. Hearing witnesses is time-consuming, and much of the collected evidence may have limited impact on the decision, or none at all, so the process may be experienced as wasteful. Experts have to investigate the accident to assess damages. A trial is also a time-consuming event for the many people needed in the courtroom. Moreover, additional fact-finding may lead to increased settlement failure if the extra information is ambiguous and can be interpreted by both parties in a self-serving way (Loewenstein and Moore 2004).

For conflicts between individuals, the costs of extensive fact-finding may be a serious barrier to justice. Therefore, many states have developed specialized dispute systems where courts or other neutrals decide without extensive fact-finding. Family disputes, employment issues, and consumer disputes are then dealt with in a procedure where the neutral requires the parties to submit the available evidence, hears the parties, tries to facilitate a settlement, and then gives a decision. Another way to save the costs of extensive fact-finding is by allowing neutrals to give a preliminary ruling based on prima facie evidence (Miller, Fisher et al. 2001).

And of course, many disputes are settled without extensive fact-finding before a claim is filed or subsequently, after a limited amount of discovery. Trials, where all available evidence is presented orally to a jury or a court, are exceptional in civil law countries where they are reserved for the most severe criminal cases. In common law countries the right to a trial may exist, but the trial as a procedure to decide disputes is vanishing (Galanter 2004). Criminal cases are routinely settled through plea-bargaining.

Whether extensive fact-finding is necessary also depends on the criteria for distribution that the dispute system applies (Barendrecht and Verdonschot 2008). If sharing rules refer to wrongful conduct or bad intent, there is more need for extensive fact-finding than

when the rules are linked to objective facts such as the duration of an employment contract or the salary of the employee.

The bottom line seems that extensive fact-finding is the exception, not the rule. The vast majority of disputes is settled or decided after an exchange of views on the facts between the parties. Extensive fact-finding is most helpful as an optional instrument against parties who acted opportunistically or intentionally harmed their opponents. As the discussion on proportional discovery in the US shows, it is difficult to establish whether discovery is useful without knowing the results of the discovery, at least in theory. In practice though, the parties and the neutral have found ways to work out together which amount of additional fact-finding is needed. The international consensus seems that it should be left to the court to determine which evidence in the possession or control of another party should be disclosed, see PTCP 2004, Article 16.2 (ALI and UNIDROIT 2004).

We may conclude, therefore, that extensive fact-finding is a useful add-on or an optional instrument for a minority of disputes, not an essential element of a dispute system. Depending on the type of dispute, however, it may be an essential option. Without the possibility to invoke extensive fact-finding, people may be exposed to opportunistic behavior or intentional harm, against which they have no recourse.

C. Legal Representation

Another common element of a dispute system is representation by a lawyer or other agent who advises and helps the parties. For each of the parties, hiring a lawyer often makes perfect sense. Engaging an agent may reduce the costs and raise the benefits of meeting and talking. A lawyer, for instance, can help his client with negotiating skills and thus lowers the costs of meeting and talking (Mnookin, Susskind et al. 1999; Mnookin, Peppet et al. 2000). Moreover, hiring a lawyer may signal that court action is imminent. It makes the threat of court action more credible. Thus a defendant may be more likely to meet if the plaintiff uses a lawyer. His presence may also raise the value of the expected outcome, because a good lawyer knows the going rates of justice, and can be expected to reach a better result in relation to distributive issues.

The presence of the lawyer, however, may also create new problems; he adds to the costs of legal representation and is responsible for a large proportion of the costs of dispute resolution (Gramatikov 2008). Depending on how he is paid, the lawyer may have a perverse interest in complicating the dispute instead of helping solve it (Hadfield 2000). Moreover, if one party takes an adviser the other will tend to take one too, which diminishes the value of the lawyer for the first party. By then there are four people who need to be willing to meet and talk, thus the coordination problem may become even worse. The same is true for access to a neutral intervention. The costs of court proceedings will be higher if lawyers are involved.

Many disputes are solved without lawyers or other agents. In developing countries, hiring a trained professional for even a limited number of hours is out of the question for the vast majority of individuals, so dispute systems cannot function if lawyers are needed. Most individuals nowadays are accessing US courts without legal representation (Rhode 2004). Many business people and others try to avoid lawyers and settle disputes between themselves until they feel they have no other option left. In most informal dispute systems--mediation, arbitration, and other ADR procedures--representation by a trained professional is not obligatory, and unlikely to occur for individual plaintiffs with limited resources.

In some situations, however, the possibility of using a professional lawyer may be an essential add-on to a dispute system. High stake criminal procedures, for instance, are unthinkable without the defendant being assisted by a person skilled in procedure and in

collecting and presenting evidence. For the vast majority of disputes, and thus in most dispute systems, legal representation may be a useful extra but not an essential element.

D. Written Briefs, Evidence and Judgments

Is it essential for a dispute system that the issues, the evidence, or the judgment are put down in writing? Again, comparison of dispute systems throughout the world seems to suggest that this is not an essential element. Informal dispute resolution procedures and mediation are mostly conducted without the issues, claims, and defenses put down in writing first. Evidence is often only presented orally and the judgment and reasoning for it may or may not be provided in writing. Negotiation processes usually take place orally, although they may be supported by written communication.

Even when it comes to documenting the outcome of the dispute resolution process, it is not evident that this has to be a written document. Civil law jurisdictions tend to emphasize written and thoroughly reasoned judgments, whilst common law countries put more trust in the process that leads to the judgment, and often allow courts to render their judgments orally. Among lawyers, the international consensus seems to be that some key steps of civil procedure should be put down in writing: the initial notification of the proceedings to the defendant (PTCP 2004, Article 5), pleadings (Article 9.2), and motions (Article 19.1). For the judgment, oral presentation is sufficient, but it should be recorded in writing (Article 23).

Written exchange of views (briefs), recording of evidence (testimony) in writing, and written judgments add substantially to the costs of access to a neutral decision. The skills to present issues, claims and defenses in a coherent way on paper are not always available among the parties to the dispute, so they may require professional help with this, which adds to the costs.

Reporting of what happens in the procedure in writing has several functions. It may be helpful as a part of what Shariff has called some form of centralized information processing (Shariff 2003). Communication, negotiation, and exploring solutions can be facilitated by putting key information in writing. This can be especially helpful if the dispute resolution process takes place in stages, or others than the ones present have to be informed of the way the proceedings progresses. Enforcement of a court decision is hard if no written record exists. Mediators, who are not bound to rules on written documentation, nevertheless have developed practices of summarizing the progress at their sessions in writing.

Another reason for requiring this is the increased transparency of what happens in proceedings, which can be an important safeguard for the parties. This can be guaranteed to some extent by a public hearing as well, or by other means such as recording what happens with a microphone and a camera.

The conclusion seems to be that a written explanation of the outcome is likely to be necessary in many cases, see Section III.E. Transparency of the procedure is an important guarantee of the quality of the proceedings, but there are several ways to achieve this. Written reporting of all what happens during the proceedings may be helpful, but it is not an essential element of a dispute system.

E. Appeals

Informal justice systems and ADR procedures that are agreed between the parties, such as arbitration, usually do not contain the possibility of an appeal, which suggests that this is not a high priority for clients. Civil procedure systems, to the contrary, generally allow an appeal, at least for disputes about issues above a certain value. Besides a safeguard for the parties, an appeal is an instrument to develop precedents that may be helpful for settling future disputes.

The place of appeals in the system can also be clarified by looking at the way informal systems in developing countries, or ADR proceedings in developed countries, are integrated in the formal system. The general picture seems to be that courts are rather deferential to settlements, mediated outcomes, decisions of arbitrators, or outcomes of informal procedures. The standard of review for these decisions is generally that they will be enforced, unless there is a clear indication of impartiality or abuse of power by the neutral (Welsh forthcoming).

Appeals are costly elements of procedures. They tend to be heard by more senior judges (neutrals), and by a higher number of neutrals. The costs of rehearing the case, with all the evidence being presented again, may be higher than the costs of a procedure where the neutral only reviews the procedure in first instance (Barendrecht, Bolt et al. 2006). A more limited review, where the standard of review guards against clear deviations from neutrality, is likely to be even less costly. This all seems to point towards a rather limited scope for appeal as a central element of a dispute system. Appeal, like the transparency of the proceedings, is more like a safeguard for the parties that the dispute system performs well, than an essential element of such a system.

VI. Conclusion

Helping people cope with disputes is arguably the most important contribution a legal system can make to economic and human development. In essence, a dispute system helps disputants perform five tasks. They have to meet, talk, share, decide, and stabilize their relationship.

Each of these tasks may be difficult for the people involved in the conflict, but there are technologies available that make these tasks easier for them. A dispute system is likely to use these basic technologies.

Task	**Description**	**Basic technology**
1. Meet	Centralized forum for information processing	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, appropriation, or avoiding
2. Talk	Communication and negotiation	Support integrative negotiation (interest based)
3. Share	Distributing value fairly	Supply information about fair shares (sharing rules, objective criteria)
4. Decide	Decision making procedure	Make option of a neutral decision available (at low cost)
5. Stabilize	Transparency and compliance	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance

Table 1 Necessary and Sufficient Elements of a Dispute System with Basic Technologies for Delivery

A dispute system may help disputants with services that make meeting more attractive for both of them. It can help them communicate and negotiate in a structured way. Providing information about fair sharing helps them deal with distributive issues. Their decision-making is facilitated by the availability of a low cost neutral decision. Stabilizing relationships is a matter of making expectations explicit and creating motivation to live up to the outcome. Formats for contracts and registrations, as well as strategies to induce compliance, can serve these interests of clients.

These five tasks, carried out by the disputants with help of dispute resolution services, form the necessary and sufficient elements of a dispute system. We have shown how these five elements interact and reinforce each other. Our analysis implies that there are strong complementarities between judging (the option of invoking a neutral decision) on the one hand, and communication and negotiation on the other. The threat of a neutral decision positively influences the bargaining process, in which incentives are diluted in case of high costs of neutral decision making. Neutral decision making can build on communication between the parties and fill in the gaps in their negotiated agreement. Another complementarity is that the expectation of a fair process and a fair outcome

increase the attractiveness of starting a dispute resolution process (meeting). Decisions that result from a fair process and reflect outcome fairness are more likely to be enforced.

One of the implications is that mediation is not a feasible stand-alone product. It is not a true *alternative* dispute resolution method. Mediation only facilitates one of the five dispute resolution tasks. On the other hand, courts (or other neutrals) are also extremely unlikely to solve disputes on their own. Restoring communication, brainstorming possible solutions, negotiation before a decision is made, and stabilizing the relationship afterwards are essential tasks as well. These outcomes are confirmed by daily dispute resolution practice, where courts routinely induce people to settle disputes, where mediators routinely act as quasi-adjudicators, and where neither adversarial procedures nor inquisitorial procedures can be found in their pure forms.

Thus, another implication is that dispute systems should strive to integrate facilitated negotiation and adjudication. Policies that try to move cases away from the courts because they are overburdened are likely to have a negative effect on the aggregate costs of disputing and the fairness of settlements. Simplifying procedures, or if necessary delegation to other neutral decision makers (panels delivering informal justice, specialized commissions, arbiters, evaluative mediators, or courts giving preliminary judgments), is more attractive from the point of view of access to justice, particularly if these work under the supervision of the (higher) courts.

Making a dispute system work is a matter of delivering five types of dispute resolution services. The basic technologies for these services are known. The challenge for dispute system design is to make them work in concert.

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